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In the Supreme Court
of the United States.

No. 15, Original, October Term, 1927.

THE STATE OF COLORADO, *Complainant*,

vs.

THE STATE OF KANSAS and THE FINNEY COUNTY WATER USERS' ASSOCIATION, a Corporation, *Defendants*.

REPLY BRIEF FOR DEFENDANTS
ON THEIR MOTION TO DISMISS THE BILL OF COMPLAINT IN EQUITY AND THE CASE.

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Topics.

WHAT REMEDY?

POSITION OF THE STATE OF KANSAS.

The extent of the burden upon Colorado.

North Dakota v. Minnesota, 263 U. S. 365, 374, 68 L. Ed. 342, 346.

New York v. New Jersey, 256 U. S. 296, 309, 65 L. Ed. 937, 943.

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THE TWO SUITS IN THE DISTRICT COURT PRESENT CONTROVERSIES OF A PRIVATE NATURE OF WHICH THIS COURT SHOULD NOT TAKE JURISDICTION IN THIS ORIGINAL CASE.

New Hampshire v. Louisiana, 108 U. S. 76, 27 L. Ed. 656.
Louisiana v. Texas, 176 U. S. 1, 22, 44 L. Ed. 347, 356.
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Oklahoma v. Atchison T. & S. F. R. Co., 220 U. S. 277, 287, 288, 55 L. Ed. 465, 468, 469.
North Dakota v. Minnesota, 263 U. S. 365, 374, 375, 376, 68 L. Ed. 342, 346.

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Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838, and 206 U. S. 46, 51 L. Ed. 956.
Missouri v. Illinois, 180 U. S. 208, 45 L. Ed. 497, and 200 U. S. 496, 50 L. Ed. 572.
Georgia v. Tennessee Copper Co., 206 U. S. 230, 51 L. Ed. 1038.
New York v. New Jersey, 256 U. S. 296, 65 L. Ed. 937.
Wyoming v. Colorado, 259 U. S. 419, 66 L. Ed. 999.
North Dakota v. Minnesota, 263 U. S. 365, 374, 375, 376, 68 L. Ed. 342, 346.

Conclusion.

What Remedy?

In our opening brief we challenged the bill of complaint as a bill of peace. We showed, we think, conclusively that it is not a bill of peace, for the reasons there set forth. Upon this subject counsel in their lengthy brief are entirely silent. They nowhere answer our contention, nor even mention it. They cite no authorities and present no argument to sustain their pleading as a bill of peace. By their silence they concede that it is not and that they cannot have an injunction against the defendants on that ground.

Position of the State of Kansas.

Since, then, the complaint is not a bill of peace, what remedy can the complainant have against the State of Kansas? It cannot have prohibition, because the State of Kansas is not in court anywhere, and prohibition will not lie except against a litigant who is actually

in court endeavoring to enforce some right; in a court that is without jurisdiction of the cause, and then only under certain circumstances. Further than that, nowhere in the complaint is there any allegation that the State of Kansas threatens or intends to bring any suit against the State of Colorado or any of its citizens connected with the flow of the Arkansas river. Nowhere in their brief do counsel assert that there is any such allegation in their complaint or any such intention on the part of the State of Kansas.

It seems perfectly clear, then, that for these two reasons the case must be dismissed as to the State of Kansas. There is no allegation in the complaint that makes it a proper party here; it threatens no injury to the State of Colorado or any of its citizens. This being true, the bill could not be maintained against it even if it were in any sense a bill of peace. It cannot be maintained as an application for prohibition, because the state is not in court. At the outset, then, the State of Kansas must be dismissed.

In *North Dakota v. Minnesota*, 263 U. S. 365, 374, 68 L. Ed. 342, 346, it was said:

"The burden of the complainant state of sustaining the allegations of its complaint is much greater than that imposed upon a complainant in an ordinary suit between private parties."

In *New York v. New Jersey*, 256 U. S. 296, 309, 65 L. Ed. 937, 943, it was said:

"Before this court can be moved to exercise its extraordinary power under the constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude, and it must be established by clear and convincing evidence."

Citing *Missouri v. Illinois*, 200 U. S. 496, 50 L. Ed. 572.

Here the complainant invokes the jurisdiction of the court to control the actions of another sovereign state, draws it into court to defend itself upon a bill of complaint which states no cause of action

and in which complainant's counsel confess that they do not know what relief they want or what relief, if any, is warranted by their bill—a most extraordinary and curious proceeding. And this brings us to the consideration of—

The Position of the Finney County Water Users' Association.

In considering this lengthy complaint and the opposing brief we are in danger of overlooking the fundamental basic facts as to the defendant, the Water Users' Association. These facts are:

(*a*) That the predecessor in interest of the Water Users' Association in 1880 constructed the canal now owned by this defendant, turned the water of the Arkansas river into it, and that the canal has ever since been used for irrigating purposes; has never been abandoned, and that association has put the water of the Arkansas river at its headgates to beneficial use whenever it could be obtained from the flow of the river.

(*b*) That this right was acquired under the laws of the State of Kansas which recognized the right to appropriate water for irrigation purposes and it has been repeatedly and continuously recognized by various statutes of the State of Kansas.

(*c*) This right is a legal right, not arising in dignity to a fee title to real estate, because the right may be lost by abandonment, but it is an exclusive possessory right—a legal right, not a mere equitable interest—and may be protected with as much certainty as a title to real estate (Kinney on Irrigation, second edition, volume 2, page 1318).

(*d*) That from the time the ditch was opened and the water put to beneficial use it was a prosperous and growing enterprise; the lands under it were speedily taken up, put into cultivation and large and profitable crops grown by irrigation. This condition continued

for about ten or fifteen years, until citizens in Colorado, seeing the success of irrigation in Kansas, began to construct canals and divert the water of the Arkansas river, and eventually there came a time when they had diverted all of the ordinary flow of the river in Colorado, so that none of it came to the headgates of the defendant association's ditch, and it has been compelled to rely upon occasional or seasonal flood water.

(c) That the appropriation of this defendant association was prior in time and is superior in right to all of the appropriations of the citizens of Colorado named as defendants in the two cases of the *Finney County Water Users Association v. Graham Ditch Company et al.* and *The Same v. Coler Ditch Company et al.*

These facts are all alleged in the two bills of complaint in the cases pending in the federal court of Colorado referred to and described in the complaint. These facts were abundantly proven by the testimony taken by this defendant in the first case against the Graham Ditch Company. Here, then, was a right vested in the Finney County Water Users' Association in 1880 and continuously held, asserted and maintained by it since that time. It was a right twenty-one years old when the suit of *The State of Kansas v. The State of Colorado* was commenced. It was twenty-six years old when it was decided; at the present moment it is forty-eight years old.

There is another basic and important fact disclosed by the complaint—that the United States Irrigating Company, owning the other three ditches and the only other ditches in Kansas, brought a suit against the same defendants that are impleaded in the Graham Ditch Company case and made settlement. In this settlement these three ditches took a priority as against the Colorado appropriators of August, 1910, in full satisfaction of all of their rights and claims in the matter. So that the Finney County Water Users' Association

is to-day the only irrigating ditch in Kansas on the Arkansas river that can bring or maintain any suit against appropriators in Colorado.

As remarked before, this suit cannot be maintained as a bill of peace. There is, owever, a tenuous and sometimes disappearing thread of argument running through the complaint (much of which is argumentative) and brief to the effect that the United States District Court for the District of Colorado has no jurisdiction of the two cases described, because the Finney County Water Users' Association cannot maintain its action or assert its right as a prior appropriator.

To uphold this contention they argue that it was decided in *Kansas v. Colorado* that none but the State of Kansas can maintain any action against the citizens of Colorado for deprivation of the flow of the Arkansas river. They approach this statement with great circumspection, but it is repeated in various forms many times, and it is the only foundation, if any, they have to maintain this action in this court. It is apparent that if the Water Users' Association has a right to bring its suit in the federal court of Colorado the question whether the suit is well founded or without merit is for that court.

If the purpose of this suit is prohibition, that result can only be obtained by challenging the jurisdiction of the federal court below. To make out any cause of action here they must convince this court that the decision in *Kansas v. Colorado* was as they contend and that as one of the effects of the decision the Finney County Water Users' Association was outlawed from any remedy to protect its right, which had been vested for a quarter of a century when that suit was decided.

It is not contended that the Water Users' Association was a party to the suit of *Kansas v. Colorado*.

There is a significant paragraph in the opinion on the demurrer in *Kansas v. Colorado*, 185 U. S. 125, where at the close of the opinion Chief Justice FULLER said that proof should be taken as to "whether certain persons, firms or corporations in Colorado must be made parties hereto."

In other words, the court intimated there that the rights of appropriators in Colorado who were diverting the flow of the river under the laws of that state could not be shut off unless they were made parties and had their day in court, and acting upon that hint or suggestion, the bill of the State of Kansas was amended and all of the appropriators then diverting water directly from the river in Colorado were made parties defendant, answered, filed briefs and participated in the argument.

The most cursory reading of the statement of the case of *Kansas v. Colorado* upon final hearing, 206 U. S. 46, will disclose that the suit was brought, not on behalf of any individual, but by the state for itself, in its proprietary right, owning certain lands riparian to the river in Kansas, and as *parens patriæ* for the benefit of all of the citizens of Kansas living in the valley of the Arkansas river. The damage claimed by the lowering of the underflow and consequent destruction of crops grown in the valley was to more than a million acres. It was claimed that the destruction of the flow of the Arkansas river was detrimental to the health of all of the inhabitants of the valley. The case was dismissed without prejudice and with leave to the State of Kansas to maintain another suit of the same character and for the same objects, because it was held that the complainant had not shown sufficient damage as alleged to itself as a riparian owner or to all the dwellers along the river in Kansas. It was shown that the irrigation ditches in Kansas served only about 40,000 acres, while damage was claimed generally to more than a million acres, and a great volume of testimony was

taken as to the nature and beneficial effects of the underflow. There are elaborate tables in the opinion showing the decline in wealth, production and population of the counties along the river which was charged to this lowering of the underflow.

At the very last of the opinion it is said:

"The influence of said diminution has been of perceptible injury to portions of Arkansas valley in Kansas, particularly those portions closest to the Colorado line."

That is to say, that portion of Kansas where irrigation is practiced.

The court thus recognized that the arid portion of Kansas, where crops can only be raised by irrigation and where these irrigation ditches are situated, is in a wholly different situation from the main part of the Arkansas valley. This deprivation had caused a peculiar injury to that portion of the state and to the Water Users' Association, putting the parties there in a class by themselves. If this court in *Kansas v. Colorado* had decided as opposing counsel contend, it would have been pure dictum; no such issue was raised by the pleadings; there is not a line or syllable in any of the briefs nor was there any of the arguments to the effect here contended for. Colorado had two defenses; one was that she had a right to retain and use all of the flow of the river; second that there was no underflow, and therefore there could be no damage to the residents of the Arkansas valley in Kansas. The court found that there was an underflow; that the citizens of the valley depending on this underflow had been injured to some extent, but not sufficiently to warrant an injunction against Colorado.

Again, if *Kansas v. Colorado* had decided, as here contended on behalf of Colorado, that the Water Users' Association cannot bring suit to protect its vested rights, and it should be, as the result, outlawed from the courts of the country, then that decision would be

void. It would be void as against collateral attack because this defendant was never in court and no such issue was ever raised. But we welcome this contention. We hope it will be met and decided by this court. However indefinitely stated by the complainant, it is sufficiently stated to challenge the attention of the court, and it is the only question worthy of consideration here. Sometime it must be decided by this court, because it has been raised in these cases in the court below, and if there defeated these defendants will undoubtedly seek admission to this court upon that question. The Water Users' Association has already expended a large amount of money in prosecuting these cases; it has taken its testimony; if this case is dismissed without deciding this issue the defendants will proceed to take their testimony, and whatever the result, that case undoubtedly will go to the Circuit Court of Appeals. If there is merit in the contention the Water Users' Association desires to know it now before it has been put to further expense. If it may not maintain its rights in the courts it wants to know it now, and stop the costs. It may be noted here that this long delay has been of great pecuniary loss to the Water Users' Association and of corresponding gain to the Colorado appropriators. Even the delay through two growing seasons caused by the institution of this case will produce a profit to the Colorado irrigators far in excess of the cost of all of this litigation.

The Finney County Water Users' Association desires a speedy determination of its rights, and we trust this court will decide upon its merits this question of its right to maintain its suits.

Counsel for complainant insist that no effective judgment can be rendered in the court below without making the State of Colorado a party, because the distribution of the water according to the various priorities in order of right is effected by certain state officers—the state engineer and others.

The Water Users' Association is in the lower court under well-know rules of irrigation law and under a practice long followed in every state that recognizes irrigation, to establish, fix and determine its priority of right to a certain amount of water from the Arkansas river as against all of the defendants whose rights it claims are inferior to its rights. That will be the nature of the decree if it succeeds. The court will establish that it is prior to A, B, C, etc., and possibly subsequent to others.

If when this decree is entered the defendants inferior to the Water Users' Association shall refuse to obey the decree, the federal court of Colorado has ample process to protect its judgment.

If the state engineer in regulating the flow of the Arkansas river ignores this decree, refuses to recognize it, he will be acting outside of the law; he will not be protected by the fact that he is an officer of the State of Colorado; by appropriate action he can be compelled to obey the law and the decree of the federal court without making the State of Colorado a party. All of this is so clear as to hardly need a statement. This was clearly and decisively held in *Weiland v. Pioneer Irrigating Company*, 259 U. S. 498, 66 L. Ed. 1027; where the defendant below was the state engineer of Colorado. The jurisdiction of the lower court was upheld, its decision affirmed, and the priority of right of the Nebraska appropriator confirmed, regardless of the state line.

The case of *Wyoming v. Colorado*, 259 U. S. 419, 66 L. Ed. 999, established in principle the right of the Water Users' Association to maintain its suits in the lower court for the establishment of its right of appropriation as paramount and superior to the appropriations by the defendants in Colorado, regardless of state lines. To that extent it was decisive in favor of the contentions of the Association.

The Two Suits in the District Court Present Controversies of a Private Nature of Which This Court Should Not Take Jurisdiction in This Original Case.

Neither the State of Kansas nor the State of Colorado was a party to the suit brought in the United States District court for Colorado by the United States Irrigating Company against various defendants, but which was settled. (Bill, subdivision *a*, paragraph 12, pp. 26-29.) Some water officers of the state had been made parties defendant, but upon their prayer the court dismissed the case against them and permitted it to be maintained against the other defendants. (Bill, p. 27.) There is no allegation in the bill that the State of Kansas maintained the prosecution of that suit.

Neither state is a party in the two suits brought in the same court by the Finney County Water Users' Association, a corporation of Kansas, to assert priority of rights to water flowing in the Arkansas river, as against various Colorado defendants. (Bill, subdivisions *b* and *c*, pp. 29-34.) There is no allegation in the bill that the State of Kansas maintained the prosecution of either of those two suits.

The first action by the Finney County Water Users' Association was filed on November 27, 1916. Motions of the defendants to dismiss, presenting objections to the jurisdiction of the court, were overruled, and the defendants answered. It is alleged in the bill that the court is about to require the defendants to present testimony in support of their claims. (Bill, p. 29.) It is a fact which will not be denied by opposing counsel that the plaintiff in that case has taken a large amount of testimony.

The second action by the Finney County Water Users' Association was filed on January 23, 1923. (Bill, p. 31.) On October 22, 1926, motions to dismiss, filed by the defendants, were overruled,

and on April 1, 1928, the answers of the appearing defendants were completed and filed. (Bill, p. 34.)

As neither state is a party to either of those two cases, no decree can be entered in them which can bind either state, and it must be presumed that the court will not undertake to enter any such decree.

There is no allegation in the bill that the State of Kansas has taken any action, or has threatened to take any action, to interfere in any way with the use of water from the Arkansas river by defendants in those two suits. It is essential to the jurisdiction of this court over the State of Kansas that such state should either have entered into an agreement with the State of Colorado, which the State of Kansas has violated, or has threatened to violate, or that the State of Kansas has committed or has threatened to commit some other legal wrong against the State of Colorado. There is no allegation in the bill of any such conduct by the State of Kansas.

The Finney County Water Users' Association brought the two suits to assert its rights to a priority of appropriation of the water flowing in the Arkansas river as against the Colorado defendants. It had a right to bring and prosecute a suit for such a purpose, and the District Court has held that it has such a right, and has overruled motions of the defendants questioning its jurisdiction.

In the case of *Louisiana v. Texas*, 176 U. S. 1, 22, 44 L. Ed. 347, 356, the court, speaking by Mr. Chief Justice Fuller, said:

"When there is no agreement whose breach might create it, a controversy between states does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state.

"In our judgment this bill does not set up facts which show that the state of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or from which it neces-

sarily follows that the two states are in controversy within the meaning of the constitution."

The first paragraph of the foregoing statement was quoted with approval in the opinion of this court by Mr. Justice Harlan in *Oklahoma v. Atchison, T. & S. F. R. Co.*, 220 U. S. 277, 287, 288, 55 L. Ed. 465, 469.

The issue of priority of appropriation between the parties in those two cases can be tried and determined therein, and a decree of the court will bind the parties and can be enforced. The facts as to the claims of the defendants may be very different. Those cases have been conducted since November 27, 1916, and January 23, 1923, respectively, as private suits, and the defendants have had the usual opportunities of litigants to present their contentions. Being private suits, the State of Colorado has no right to maintain this action, or to here assert the contentions which the defendants in those cases have asserted, or can assert in the District Court.

New Hampshire v. Louisiana, 108 U. S. 76; 27 L. Ed. 656.
Louisiana v. Texas, 176 U. S. 1, 22, 44 L. Ed. 347, 356.
Kansas v. U. S., 204 U. S. 331, 340, 341, 51 L. Ed. 510, 512, 513.
Oklahoma v. Atchison, T. & S. F. R. Co., 220 U. S. 277, 287, 288, 55 L. Ed. 465, 468, 469.
North Dakota v. Minnesota, 263 U. S. 365, 374, 375, 376; 68 L. Ed. 342, 346.

The case of *Kansas v. Colorado*, 185 U. S. 125, 46 L. Ed. 838, and 206 U. S. 46, 51 L. Ed. 956, did not present any questions of relative priorities of appropriation between parties in Kansas and in Colorado. The State of Kansas claimed the right on its own behalf, and of its citizens resident in the Arkansas valley, to the substantially unimpaired flow of the water of the Arkansas river, both for use directly from the river and to percolate through the subsoil and furnish underground water for crops and for other uses throughout the valley. Colorado claimed the right to authorize the taking of all the flow of water for irrigation and other uses in Colorado. There

was no decree therein on the question of priorities of the appropriation, and the decree in that case cannot be *res adjudicata* in this case.

In the case of *Missouri v. Illinois*, 180 U. S. 208, 45 L. Ed. 497, and 200 U. S. 496, 50 L. Ed. 572; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 51 L. Ed. 1038; *New York v. New Jersey* and *North Dakota v. Minnesota*, supra, the action of the defendant state created a public nuisance as against the citizens of the complaining state, and jurisdiction of the court was sustained upon that ground; although it was held in *New York v. New Jersey* that the complainant had not established a case.

In the case of *Wyoming v. Colorado*, 259 U. S. 419, 66 L. Ed. 999, there had been no pendency of private suits by the water appropriators situate in Wyoming.

The State of Colorado had purported to authorize two corporations created under its laws to divert a part of the water of the Laramie river in Colorado into the valley of Cache la Poudre, and the corporations were proceeding to effect such diversion. The appropriators of water from the Laramie river, situate in Wyoming, were threatened by that action of the State of Colorado and of the two corporations under its authority, with a loss of a large part of the flow of the water in the Laramie river, from which they had obtained their supply of water for irrigation. There was a single threatened injury which would effect in a similar manner all of the Wyoming appropriators, with rights which were vested and prior to any which could be obtained by the two corporations under purported authority of the laws of Colorado.

In the case of *North Dakota v. Minnesota*, 263 U. S. 365, 68 L. Ed. 342, this court took jurisdiction of a bill by North Dakota against Minnesota. The bill charged that Minnesota, by the construction of drainage ditches and the straightening of the Mustinka river, increased the speed and volume of its flow to Lake Traverse,

and thereby raised the level of the lake, and caused its outlet, the Bois de Sioux river, to overflow and greatly injure a valuable farming area in North Dakota on the west bank of the latter stream. Damage was alleged to North Dakota by the destruction of roads and bridges, and damage to the owners of the farms in the destruction of crops and injury to the arable quality of their land in a large amount. The court held that North Dakota had such an interest as quasi sovereign in the comfort, health and prosperity of her farm owners, that resort might be had to that court for relief, and that the bill alleged the creation of a public nuisance. By the course of action of Minnesota in the construction of its drainage system it was the result of the allegations that there was a like kind of injury which caused and which threatened to cause many farm owners in the Bois de Sioux valley in North Dakota great damage, although the amount of injury in each instance might be different. The court said:

"The right of a state as *parens patriæ* to bring suit to protect the general comfort, health or property rights of its inhabitants, threatened by the proposed or continued action of another state, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister state. For this reason the prayer for a money decree for the damage done by the floods of 1915 and 1916 to the farms of individuals in the Bois de Sioux valley is denied for lack of jurisdiction."

The instant case by the State of Colorado is for the purpose of taking away from the District Court the jurisdiction of the two cases, in which the District Court has made some rulings adverse to the Colorado defendants and in which the Colorado defendants will be required to present evidence in support of their contentions of priority of rights. That evidence will differ according to the time of the appropriation and the methods pursued by each of the Colorado defendants.

There is no allegation of any acts or threat of acts by the State of Kansas that will cause a similar injury to the defendants in the cases in the District Court. There is no allegation of any physical acts or the threat of any physical acts by the Water Users' Association which will cause any injury to those defendants. The Water Users' Association has gone into the District Court to litigate its claims of priority against the defendants—a course of procedure which it had a right to take.

Conclusion:

In conclusion we submit that the State of Kansas should be dismissed. There will then remain the sole question of what is the meaning and effect of the decision in *Kansas v. Colorado*. Its meaning is plain, and as this court will continue to follow the long line of decisions cited in our original brief, then the United States District Court for Colorado has jurisdiction of the cases brought by the association and should proceed to judgment in the usual way.

All of which is respectfully submitted.

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